No. 11,807

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

FRANK ROWLEY,
Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

FIRST POINT RAISED.

1. APPELLANT EXPRESSLY OBJECTED TO THE ADMISSION INTO EVIDENCE OF THE MEDICAL TEXTBOOKS AND PRESERVED THIS OBJECTION IN HIS EXCEPTIONS.

When counsel for appellee offered the medical textbooks in evidence, counsel for appellant stated:

> "We object to them as exhibits, your Honor, because, as I remember the rule, textbooks are inadmissible. But we have no objection to the Court consulting any work that he desires—researches on this case. As exhibits we object to them." (Appellee's brief, p. 12.)

Appellee thereupon withdrew his offer that the books be received as evidence, and stated:

> "I merely offer them for the consideration of the doctor and the Court." (Appellee's brief, p. 13.)

The following then transpired:

> "Court. Very well, I understand the proffer is withdrawn and that counsel for the defense have no objection to the Court considering these texts.
>
> Mr. Grigsby. Nor any other texts." (Appellee's brief, p. 13.)

Appellee's statement in his brief (p. 13) that no mention is made in the exceptions and assignments of errors of the trial Court's error in considering the medical textbook is not borne out by the record.

In appellant's exceptions (T.R. 12) it is expressly stated:

> "Defendant excepts to Finding of Fact No. III * * * on the ground that such finding was based partially upon improper evidence as detailed in paragraph IV, of said Findings of Fact."

Paragraph IV of the findings details Wechsler's Textbook as one of the elements of evidence relied on by the trial Court in fixing the damages.

Again, in paragraph IV of appellant's assignment of errors, the trial Court's judgment is excepted to on the ground that the judgment is:

> "* * * not justified by the evidence introduced in the trial of said cause." (T.R. 17.)

It is well settled that once an objection has been made to a certain class of evidence it need not be repeated if evidence of the same class is again offered.

53 *Am. Jur.* 131.

"If there has been a sufficient and specific objection to testimony, it is not necessary to repeat the objection in the event that testimony of the same character is again offered."

Jones on Evidence, Civil Cases, 4th Ed. 1938, Vol. 3, p. 1663.

To the same effect:

Grand Trunk Pac. Ry. Co. v. Tollard (C.C.A. 8th), 286 Fed. 676, 678;

Salt Lake City v. Smith, et al. (C.C.A. 8th), 104 Fed. 457, 470;

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Tucker v. Reil, 51 Ariz. 357, 77 Pac. (2d) 203, 208;

North American Acc. Ins. Co. v. Caskey's Adm'r, 218 Ky. 750, 756, 292 S.W. 297, 299;

Bennett v. Gusdorf, 101 Mont. 39, 53 Pac. (2d) 91, 95;

Cromeenes v. San Pedro, L.A. & S.L.R. Co., 37 Utah 475, 109 Pac. 10, 14;

Maxcy v. Peavey, 178 Wis. 401, 190 N.W. 84, 86.

Appellant specifically objected to the admission of Wechsler's Textbook in evidence. The offer having thereupon been withdrawn by appellee, it was unnecessary thereafter to renew the objection when Dr. Romig improperly quoted from this textbook (T.R. 46-47) and summarized portions thereof (T.R. 44, 48, 49) in basing his prognosis on that textbook (T.R. 44).

> "Certainly, if the book itself cannot be read in evidence to the jury, the witness cannot be permitted to give extracts from it as evidence, depending upon his memory for their correctness."
>
> *Boyle v. State,* 57 Wis. 472, 479, 15 N.W. 827.

A witness should not be permitted to read as evidence matters that have not been admitted into evidence.

> *Ward v. Liverpool Salt & Coal Co.,* 79 W. Va. 371, 92 S.E. 92, 97.

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2. APPELLANT DID NOT CONSENT TO THE USE OF THE TEXTBOOK IN EVIDENCE AS THE BASIS OF THE TRIAL COURT'S FINDINGS.

In all the authorities cited by appellee in his discussion of the first point raised in his brief (pp. 14-16), the questioned material was actually admitted into evidence. In the case at bar, the textbooks were offered in evidence, but the offer was withdrawn upon objection by appellant. Consequently they were never received in evidence.

In appellee's brief (p. 11) he concedes that pages 534 to 540, inclusive, of Wechsler's were never admitted in evidence. It is thus apparent that the authorities cited by appellee and the reasoning therein have no applicability to the present case.

Despite the fact that it was never in evidence, appellee argues (p. 13) that the trial Court was entitled to "consider" Wechsler's text in arriving at his decision.

Although pages 534 to 540, inclusive, of Wechsler's Textbook were admittedly never in evidence, the trial Court, in finding No. IV (T.R. 9-10) unequivocally stated:

> "* * * that in the fixing of said amount of thirty-seven thousand dollars, pages 534 to 540, inclusive, sub-entitled 'Fracture of the Skull,' of 'A Textbook of Clinical Neurology, with an Introduction on the History of Neurology,' by Israel S. Wechsler, M.D., Fifth Edition, Revised, 1944, W. B. Saunders Company, were considered."

And in his certificate to the counter-praecipe, wherein these pages are made part of the record in this case (T.R. 171-182) the trial Court stated:

> "The foregoing seven and one-third pages of typewritten matter have been copied from pages 534 to 540, inclusive, of 'A Textbook on Clinical Neurology,' etc., by Israel S. Wechsler, M.D., Fifth Edition, Revised, published by W. B. Saunders Company, Philadelphia and London, 1944, *and are a true copy of the original text of said work considered in arriving at the decision embodied in the Judgment* in the case of Frank Rowley v. Z. E. Eagleston, cause No. A-4239 of the District Court for the Territory of Alaska, Third Division. *No other part of said book was considered.* The foregoing is the material referred to in the latter part of Paragraph IV of the Findings of Fact in said cause signed and entered on Dec. 27, 1946." (Italics ours.)

It is well established that a trial Court cannot base its findings upon matters not in evidence.

> "A judge assuming to determine questions of law and fact in a law action where a jury is waived must arrive at his conclusions regarding facts at issue from matters presented on the trial and not from matters which have come to his knowledge in some other manner."
>
> *New York Life Ins. Co. v. Tedder,* 113 Fla. 649, 153 So. 145, 148.

To the same effect:

> *Cassels v. Ideal Farms Drainage Dist.,* 156 Fla. 152, 23 So. (2d) 247, 249;
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> *State v. Smith* (Mo.), 134 S.W. (2d) 1061;
>
> *O'Rourke v. Cleary,* 105 Vt. 85, 163 Atl. 583, 584;
>
> *Johnson v. Superior Rapid-Transit Ry. Co.,* 91 Wis. 233, 64 N.W. 753, 754.

A document is not proof of the facts stated therein unless tendered in evidence and admitted for that purpose.

> *Quitman Oil Co. v. McRee,* 18 Ga. App. 128, 88 S.E. 921.

Appellant's statement that he had no objection to the Court "consulting" Wechsler's Text, "or any other texts", did not have the effect of placing these texts *in evidence* so as to form the basis of the Court's findings and judgment.

In the colloquy between Court and counsel concerning the textbooks, counsel for appellant specifically stated:

> "But we have no objection to the Court consulting any work that he desires—researches on this

> case. *As exhibits we object to them.*" (Italics ours.) (Appellee's brief, 12.)

In so stating counsel for appellant expressly adhered to his position that these works were inadmissible *as evidence* and merely assented to the prerogative of any Court, sitting without a jury, to have recourse to general works touching on the topic which is the subject matter of the case at bar to assist the Court in logically arriving at a decision, but in no sense to base his decision on the contents of the works thus referred to. The prerogative referred to is an old doctrine in the law and is perhaps best stated in *Wharton's Law of Evidence,* 3rd Ed. (1888), Sec. 665, at pages 650, 651. Concerning such use of scientific treatises, Wharton said:

> "In an argument *to a court* such works may be read, not as establishing facts, * * * but as exhibiting distinct processes of reasoning which the court, from its own knowledge as thus refreshed, is able to pursue. But if offered *to establish facts* capable of proof by witnesses, or to introduce expert authority under the guise of an argument, such books should not be received, *even when addressed to the court;* nor should they under any circumstances be read as part of an argument to the jury." (Italics ours.)

Jones, in his work on Evidence, likewise points out the proper function of scientific texts when used by the Court to aid him in arriving at a decision:

> "When books of science or general literature are thus used during the argument of counsel, they are merely adopted as the argument of counsel. They are used by way of *illustration,* and

cannot be used for the purpose of proving facts." (Italics ours.)

Jones Commentaries on Evidence, Vol. 3 (Horwitz), Sec. 580, p. 749.

It is error for the Court, sitting without a jury, to treat and consider as evidence scientific texts proffered only for purposes of illustration to guide the reasoning of the Court.

Boyle v. State, supra, 479.

The Court may not use his personal observation of matters not in the record, although present at the trial, as evidence upon which to base his findings.

Conyer v. Burckhalter (Tex. Civ. App.), 275 S.W. 606, 613;

Kay v. Cain (C.C.D.C.), 154 Fed. (2d) 305, 306.

In the present record, any information which the Court may have gleaned from Wechsler's Textbook could be used only for the purpose of aiding his reasoning power and to enhance his personal knowledge upon the subject. It is well established, however, that a trial judge may not use this personal knowledge as a basis for his findings, but must adhere strictly to the evidence offered and received in the record.

Tullgren, et al. v. Karger, et al., 173 Wis. 288, 181 N.W. 232, 234;

Utah Nursery Co. v. Marsh, 46 Colo. 211, 103 Pac. 302;

Kovacs v. Szentes, 130 Conn. 229, 33 Atl. (2d) 124, 125;

New York Life Ins. Co. v. Tedder, supra;

Pua v. Hilo Tribune-Herald, 31 Haw. 65;
Skyline Swannanoa v. Nelson County, 186 Va. 878, 44 S.E. (2d) 437, 441.

"Members of a judicial or quasi-judicial body should not, and do not, decide issues on personal knowledge, but only upon the evidence produced before them."
Skyline Swannanoa v. Nelson County, supra.

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3. **THE TRIAL COURT ERRONEOUSLY BASED ITS FINDING IV UPON INADMISSIBLE EVIDENCE, AND SO CO-MINGLED IT WITH OTHER EVIDENCE AS TO VITIATE THE ENTIRE FINDING AND THE JUDGMENT RENDERED THEREON.**

Appellee erroneously argues that inasmuch as there was other evidence in the record (in addition to the objectionable textbook and testimony thereon) the findings of the trial Court and the judgment must stand.

This rule of law, as contended for by appellee, is contained in 3 *Am. Jur., Appeal and Error,* Sec. 940, p. 504, and in 5 *C. J. S., Appeal and Error,* Sec. 1728, p. 997. These authorities correctly hold that in an action tried by a Court without a jury, it will be presumed, *in the absence of indication to the contrary,* that the trial judge, in reaching his findings, disregarded incompetent evidence, erroneously admitted, and based his findings upon properly admitted evidence. This rule, however, is not applicable in the instant case. Here the Court both in his findings and his certificate to the counter-praecipe, specifically states that he based his findings upon the objectionable text material.

As said in 3 *Am. Jur.,* supra,

> "This presumption, however, loses its force when it reasonably appears from an inspection of the record that the incompetent testimony did influence in some degree the action of the trial court in rendering the particular judgment."

And in 5 *C.J.S.,* supra,

> "On the other hand, the admission of incompetent evidence which influences the court in arriving at its decision may be regarded as prejudicial error requiring reversal."

Applying these rules, the Supreme Court of Oregon, in *Menefee v. Blitz* (Ore.), 179 Pac. (2d) 550, 564, stated:

> "In the case at bar it is impossible to presume that the erroneously admitted testimony was not considered when the findings were entered. It affirmatively appears that it was considered, and that it influenced the trial court when the attacked judgment was rendered. We conclude that the first two assignments of error must be sustained."

To the same effect:

> *Southern Surety Co. v. Nalle & Co.* (Tex. Civ. App.), 242 S.W. 197, 202.

The rule, thus stated and applied, as to the affirmative co-mingling of incompetent evidence with other evidence in arriving at a finding may likewise be applied with equal force to the testimony of the witness Daugherty in answer to appellee's argument at pages 17 to 19 of his brief.

THIRD POINT RAISED.

In support of his contention that the damages awarded were not excessive, appellee cites several cases.

In *McDonald v. Standard Gas Engine Co., et al.,* 47 Pac. (2d) 777 (appellee's brief p. 19) and *Marland Refining Co. v. McClung,* 102 Okl. 56, 226 Pac. 312 (appellee's brief, p. 25), the injuries sustained by the plaintiffs are set forth in full in appellee's brief. A cursory comparison of the injuries and resultant disabilities in those cases with those sustained by appellee in the case at bar clearly shows that in the former cases the initial injuries were much more severe; and involved other parts of the body, in addition to the head. The hospital periods were substantially greater, and the prognosis showed far less chance of complete recovery.

In *Miller v. Tennis,* 140 Okl. 185, 282 Pac. 345 (appellee's brief, p. 28), the plaintiff, in addition to the skull fracture mentioned in appellee's brief, had his forehead badly caved in; the eyebrows torn loose at the top and driven directly into the brain; a punctured sinus, and there was testimony that he would constantly suffer the remainder of his life and be deprived of earning a livelihood.

In *Figlar v. Gordon,* 133 Conn. 577, 53 Atl. (2d) 645 (appellee's brief, p. 29), in addition to the skull fracture, plaintiff sustained a badly comminuted fracture of both the right tibia and fibula causing her to walk with a limp a year after the accident, and at the time of the trial she had a ten per cent loss of the

use of her lower limb. After the injury there was grave doubt as to whether she would survive.

Likewise, in *Elder v. Chicago R.J. & P. Ry. Co.,* 204 N.W. 557 (appellee's brief, p. 30), the plaintiff was badly burned in addition to the head injury, and he sustained an injury to the spinal cord and broken ribs. At the time of the trial he was deformed.

The severity of the injuries in the cited cases clearly entitled the plaintiffs therein to substantially more monetary damages than appellee should receive in this case.

As stated in appellant's opening brief, the cases therein cited were decided in periods when the purchasing power of the dollar was comparable to that at the time of the trial in the instant case (appellant's opening brief, p. 63).

Appellant is convinced that an examination of all the cases cited by the parties hereto will lead to the inevitable conclusion that the damages awarded herein were excessive.

Appellant respectfully submits that the judgment should be reversed.

Dated, San Francisco, California,
October 15, 1948.

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